The Advocate

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Promoting smart sentences, reducing waste
By: Ed Monahan

Ed Monahan
Public Advocate

This issue of *The Advocate* reviews the provisions in the penal code that emphasize probation and alternative sentences over incarceration.

The Kentucky Penal Code was founded on a philosophy of rehabilitation with a strong preference for probation over incarceration. After enactment of 2011's HB 463, the Code continues to emphasize probation and other alternatives to incarceration, despite elements of mandatory minimums that have crept into the Code over time. The history of the legislative philosophy of preferring probation and alternatives to incarceration over imprisonment is detailed by Ernie Lewis and Dan Goyette in The Kentucky Penal Code: Forty Years of Unresolved Tension and Conflict Between Sentencing Philosophies, *The Advocate* (October 2014) found at: http://dpa.ky.gov/

Since 1974, there has been an enormous increase in Kentucky's incarceration and its costs, with a $14.9 million increase in the last year.

There are smart, cost-effective commonsense reforms readily available to reduce incarceration costs. These reforms have increasing national and Kentucky bipartisan support and the voters of California recently voted by an 18 point margin to lower penalties to reduce costs.

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The Kentucky Felony Sentencing Process: Presumptions of Probation, Conditional Discharge, and Alternative Sentencing
By: Glenn McClister

Glenn McClister
Staff Attorney

The "sentencing" of a client is not a singular event that occurs one day after either a jury verdict or the entry and acceptance of a guilty plea. It is the *last* event of a process, the culmination of early efforts toward trying to achieve the most favorable outcome for a client and the best possible advocacy that can be done on the day of sentencing. Often, some of the most favorable outcomes for a client are achievable only if ground work is laid during the sentencing phase of a trial or through negotiations with the prosecutor in the event of sentencing after a guilty plea.

I. Sentencing Outcomes Dependent upon Events Occurring in the Sentencing Phase of a Trial

A. **TRUTH-IN-SENTENCING / MITIGATION EVIDENCE:** KRS 532.055, the truth-in-sentencing statute, governs verdicts in felony cases and requires a separate sentencing phase as well. KRS 532.055 does not apply to misdemeanor verdicts. *See, Commonwealth v. Philpot*, 75 S.W.3d 209 (Ky. 2002). In the sentencing phase, the Commonwealth is allowed to offer evidence concerning:

- Parole Eligibility – Testimony regarding parole eligibility must accurately reflect the law. *Commonwealth v. Higgs*, 59 S.W.3d 886 (Ky. 2001)
- Prior Convictions – This testimony is to be general rather than specific, and limited to the elements of the offenses. *Mullikan v. Commonwealth*, 341 S.W.3d 99, 109 (Ky. 2011). Proof of prior convictions should normally be in the form of certified copies of the final judgments of conviction. *Hall v. Commonwealth*, 817 S.W.2d 228 (Ky. 1991).
- Maximum time to serve on current and prior offenses
- The defendant's current status, including probation, parole or any other kind of legal release
- Juvenile adjudications for crimes which would have been a felony if committed by an adult
- Victim impact – KRS 532.055(2)(a)(7) defines "victims" pursuant to KRS 421.500(1). Multiple victims may testify. KRS 421.520 provides for written impact statements to be included in the PSI. This evidence is irrelevant to the issue of guilt or innocence and should be reserved for the penalty phase of the trial. *Bennett v. Commonwealth*, 978 S.W.2d 322 (Ky. 1998).

The defendant may present evidence in mitigation and support of leniency. KRS 532.055(2)(b). While the "truth-in-sentencing" portion of the statute lists numerically those things which may come into evidence for purposes of sentencing, the mitigation portion of the statute is not so limited, and speaks only generally. However, case law has determined what "mitigation and support

of leniency" evidence includes, for non-capital cases mitigation evidence which pertains to the defendant's character, prior record, or the circumstances of his offense; *Wood v. Commonwealth*, 2014 WL 1998727 (Ky. App. 2014) (unreported, opinion not to be published).

B. **PFO ELIGIBILITY:** KRS 532.055(3) seems to require a combined truth-in-sentencing/PFO phase. The PFO statute seems to require a separate PFO phase. KRS 532.080(1). The better practice is to combine the two phases, but then to require the jury to first set a sentence on the underlying offense, then make a finding of guilt or innocence regarding the PFO, and if guilty then proceed to fix a sentence on the PFO. *Owens v. Commonwealth*, 329 S.W.3d 307 (Ky. 2011).

C. **CAPITAL TRIALS:** The truth-in-sentencing phase of a capital trial may be combined with the capital penalty phase. *See, e.g., Soto v. Commonwealth*, 139 S.W.3d 827 (Ky. 2004).

D. **SENTENCING VERDICT:** In cases involving multiple felony charges, the jury's verdict should include a recommendation whether the sentences should be served concurrently or consecutively. KRS 532.055(2). This is to clarify the intent of the jury. Although not binding on the court, the defendant has a due process right to the recommendation. *Davis v. Commonwealth*, 365 S.W.3d 920, 922 (Ky. 2012).

E. **SENTENCE REDUCTION:** The court may reduce the sentence of a jury if it finds the sentence to be unduly harsh. This even includes reducing a sentence on a Class D felony to misdemeanor jail time. KRS 532.070.

II. Sentencing Outcomes Dependent Upon Agreement with the Prosecutor

Based upon recent court decisions interpreting the separation of powers provisions of the Kentucky Constitution, sentences of deferred prosecutions or diversions of a Class D felony – both of which result in the dismissal of a suit upon successful completion of the conditions of deferment or diversion – require the agreement (or at least, lack of objection) of the prosecution. Therefore, for the client to a have a realistic chance at one of these outcomes, defense counsel must negotiate these outcomes with the prosecutor. In some cases, the prosecutor will agree to jointly recommend the outcome to the court while in others, the prosecutor may be willing to leave the decision of whether to grant a deferred prosecution or a diversion to the discretion of the court.

A. **DEFERRED PROSECUTION:** KRS 218A.14151 sets out the procedure for deferred prosecution of those defendants charged with Possession of a Controlled Substance, 1st Degree, 1st or 2nd Offense, KRS 218A.1415. Deferred prosecution is the "preferred alternative for a first offense." Deferral does not require a guilty or an *Alford* plea, and successful completion of the period of deferral entitles the defendant to dismissal of the charges and the sealing of the record. Whether the district court can approve a deferred prosecution agreement concerns subject matter jurisdiction, and as the statute requires dismissal of the charge upon the successful completion of the deferred prosecution program, such act that is explicitly outside a district court's jurisdiction. *Commonwealth v. Vibbert*, (Ky.App. 2013). Simply stated, the trial court lacks the statutory and constitutional authority to place a drug defendant in a deferred prosecution program absent consent of the prosecutor. *Reilly v. Commonwealth,* 2013 WL 1688381 (Ky.App. 2013), unreported, opinion not to be published, rehearing denied, review denied.

B. **FELONY DIVERSION:** KRS 533.250 *et seq.* governs felony diversion in circuit court. It is only available to defendants charged with Class D felonies, who have not had a felony conviction, have not been on probation or parole, or have not been released from serving a felony sentence within the last 10 years, and who have not had a felony diversion within the last 5 years. Other limitations also exist. Like deferred prosecution, a diversion is available only upon agreement (or lack of objection) of the Commonwealth. *Flynt v. Commonwealth*, 105 S.W.3d 415 (Ky. 2003).

III. Sentencing Outcomes Independent of Agreement with the Prosecutor

The decision whether to conditionally discharge, probate, or grant an alternative sentence that does not result in the dismissal of a suit is left to the sound discretion of the court, within the bounds of statutory requirements. In some jurisdictions a court may allow the prosecutor to "build in" probation into the offer, such that if the offer is accepted, but the court chooses not to probate, the defendant can withdraw his offer. In other jurisdictions, the court may refuse to allow the prosecutor to make probation part of the offer. In any event, such decisions ultimately are the province of the court, and the court can probate whether the Commonwealth agrees with probation or not.

A. **PROBATION or CONDITIONAL DISCHARGE:** The penal code was designed so that probation is the default option for the court. The requirement that courts consider probation was in the original penal code in 1974 (1974 c 406, § 285, eff. 1-1-75). The 1974 Kentucky Crime Commission/LRC Commentary to the Penal Code says, "This section seeks to establish a policy in favor of rehabilitation of offenders within the community and free of incarceration." It then quotes the drafters of the Federal Criminal Code:

> "There are several reasons for this approach, not the least of which is the economy of probation as compared to imprisonment. It costs about one-tenth of the outlay, under present standards, to maintain an offender on probation as compared to maintaining him in prison. But of course economy alone would not justify such a position if it were likely to result in less protection to the public from crime. The encouraging results of sentences which concentrate on helping the offender to live normally in the community also are believed to support the position taken in the draft. All that is being said, it should be kept in mind, is that probation offers enough hope in enough cases so that the judge should consider it seriously in every case, and use it as often as he can without offending other principles which also demand recognition in the sentencing process."

So, incarceration was intended to be the exception, not the rule. KRS 533.010(2) says, **"**Probation or conditional discharge shall be granted" unless imprisonment is necessary for protection of the public under one of 3 conditions. There now are, however, a number of restrictions on the possibility of probation. *See, e.g.,* KRS 439.3401; KRS 532.045; KRS 532.080; KRS 533.060; KRS 533.065.

B. **PRESUMPTIVE PROBATION:** KRS 218A.1415(2)(d) provides, that:

> If a person does not enter a deferred prosecution program for his or her first or second offense, he or she shall be subject to a period of presumptive probation, unless a court determines the defendant is not eligible for presumptive probation as defined in KRS 218A.010.

The definition of "presumptive probation is in KRS 218A.010(37). The prosecution must state on the record "the substantial and compelling reasons" why the defendant should not be probated. *Jones v. Commonwealth*, 413 S.W.3d 306 (Ky.App. 2012).

C. **ALTERNATIVE SENTENCING PLANS:** If probation is not appropriate, the next default is probation with an alternative sentencing plan. Alternative sentencing has been a part of Kentucky law since the Governor's 1998 Crime Bill (1998 c. 606, § 73, eff. 7-15-98). KRS 533.010(3) says, "Probation with an alternative sentencing plan shall be granted," again, with 3 exceptions regarding protection of the public. An alternative sentencing plan is also an appropriate response to revocation of probation (and arguably of a diversion) as well. KRS 533.010(6) lists the alternatives, including residential treatment and "any other specified counseling program, rehabilitation or treatment program, or facility." KRS 533.015 (1998 c 606, §166, eff. 7-15-98) says that whenever a statute mentions probation or any alternative to incarceration, that alternative may include community-based, faith-based, charitable, church-sponsored, and nonprofit programs. In other words, anything that will work!

IV. The Sentencing Hearing

Prior to imposing any sentence, the Court is required to conduct a hearing at which the defendant may be heard, and where evidence relevant to sentencing decisions shall be taken.

A. **PRE-SENTENCE INVESTIGATION REPORT (PSI) -** The court should order a presentence investigation report prior to sentencing, KRS 532.050. A court can sentence a defendant without one, but this is frowned upon. *Fields v. Commonwealth*, 123 S.W.3d 914 (Ky.App. 2003). The defendant has the right to inspect and controvert any part of the report, although the defendant may waive that right. Copies of the report must be furnished to defense counsel no later than 2 business days before sentencing, RCr 11.02. The report must include the facts behind the charges, the defendant's criminal history, physical and mental condition, family situation, employment history, educational level, personal habits, the results of the defendant's risks and needs assessment, and recommendations for rehabilitation. The report should also include a preliminary calculation of the defendant's jail credit. KRS 532.120.

B. **NEW PSI:** When a defendant violates the terms of his diversion, the court decides to revoke the diversion and the Commonwealth has decided to proceed to sentencing, the defendant is entitled to a sentencing hearing just as if he had never been diverted, including an updated PSI. *Peeler v. Commonwealth*, 275 S.W.3d 223 (Ky.App. 2008).

C. **OTHER APPROPRIATE EVIDENCE:** KRS 533.010(2) provides:

> Before imposition of a sentence of imprisonment, the court shall consider probation, probation with an alternative sentencing plan, or conditional discharge. Unless the defendant is a violent felon as defined in KRS 439.3401 or a statute prohibits probation, shock probation, or conditional discharge, ***after due consideration of the defendant's risk and needs assessment, nature and circumstances of the crime, and the history, character, and condition of the defendant***, probation or conditional discharge shall be granted, unless the court is of the opinion that imprisonment is necessary for protection of the public… [emphasis added].

It is presumed that the information emphasized above will be contained within the PSI or New PSI. However, in the event that the PSI has deficits which can be supplemented by the defense and which are relevant to sentencing, the defense may elicit such evidence either by a motion to probate or by introduction of testimony into evidence at the sentencing hearing, or both.

V. ILLEGAL SENTENCES

The court fixes the penalty when a defendant enters a plea of guilty. RCr 9.84(2). Issues involving illegal or improper sentences are jurisdictional and are not waived by the entering of a guilty plea. *See, e.g., Grigsby v. Commonwealth*, 302 S.W.3d 52 (Ky. 2010).

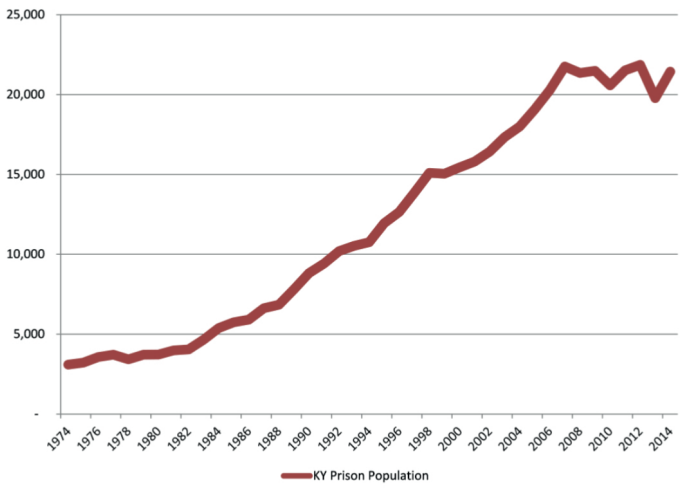
The 40 Year Reality of Kentucky Incarceration and Its Cost
$14.9 Million Increase in Last Year
By: Ed Monahan

So how are the penal code and HB 463 philosophies being implemented by judges, parole board members, and prosecutors?

The huge increase in incarceration and cost of corrections over the last four decades demonstrates that the intent of the Code and HB 463 is too frequently ignored by those who have great discretion in the way it is implemented.

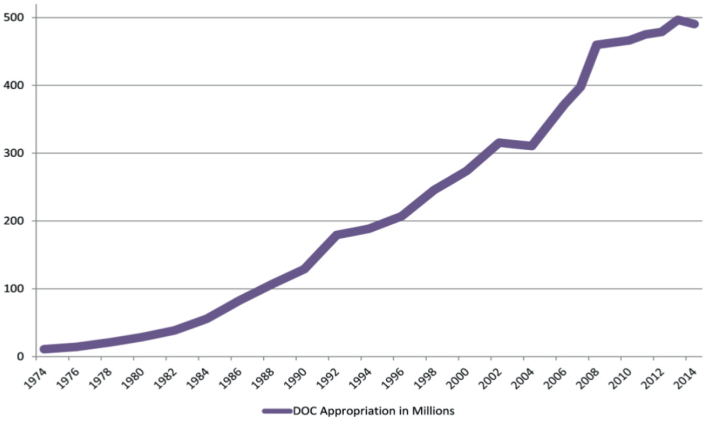
In 1974, the Kentucky prison population was 3,093. In 2014 it is 21,436.

Kentucky Prison Populations Since Enactment of the Penal Code

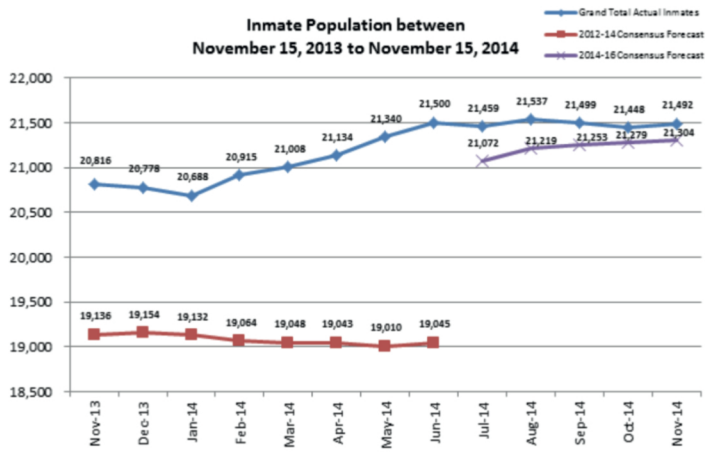


In 1974, Kentucky spent $ 11 million on corrections. In 2014, the correctional budget is $ 490.5 million.

Kentucky DOC Budgets Since Enactment of the Penal Code

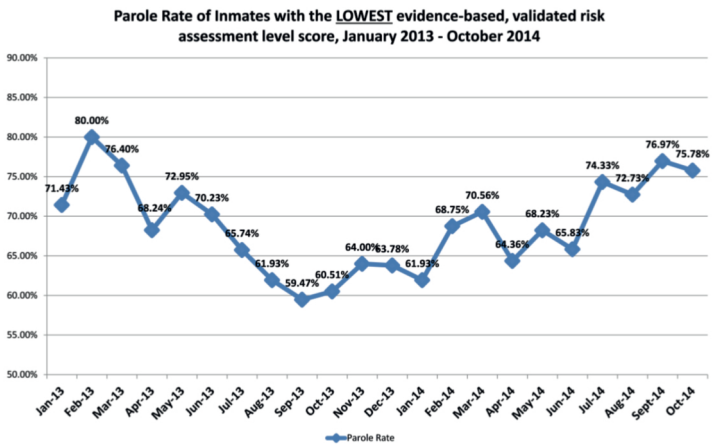


The Kentucky prison population from November 2013 to November 2014 increased by 676 inmates. The average yearly cost of an inmate in a state facility is $22,038. The increase of 676 inmates is a cost of $14.9 million.



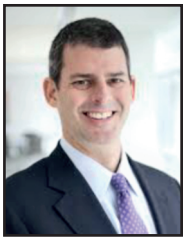
July 13 - July 14 forecasted population is from the 2012-14 biennial budget consensus blended population projections. The 2014-16 biennial budget consensus blended population projections are used for July 2014 forward.

Many inmates evaluated by evidence based, validated risk assessments as being low risk of offending are not being paroled.



Broadening National Bipartisan Conversation on Our Responsibility to Reduce Incarceration
By: Ed Monahan

A remarkable shift is taking place in our country. Liberals and conservatives disagree on so many issues yet increasingly there is common ground amongst ideologies and political forces on the need to reduce wasteful correctional costs because of governments over incarceration. In November 2014, Pew's Public Safety Performance Project, along with the U.S. Department of Justice Bureau of Justice Assistance and the Council of State Governments Justice Center, conducted the first gathering of past and present Justice Reinvestment Initiative states. Four hundred professionals from 30 states gathered to make further progress on reducing incarceration.


Adam Gelb

Adam Gelb, Director of the Public Safety Performance Project at the Pew Charitable Trusts said, "Since 2007, more than half the states have taken a fresh look at their sentencing and corrections policies through the Justice Reinvestment Initiative. Applying a data-driven approach, these states have embarked on reforms designed to protect public safety, hold offenders accountable, and control corrections costs. Through these and other efforts, the U.S. prison population, after nearly 40 years of unabated growth, has leveled off and begun to fall. Many states are celebrating lower recidivism rates and overall crime has continued to drop. For juveniles, violent crime arrest rates and commitment rates are roughly half what they were in the late 1990s.

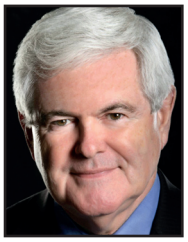
A central question now is whether these trends will be fleeting or lasting. Have the new policies been motivated mostly by budget concerns and other temporary forces, suggesting that prison growth will resume when state budgets recover? Or is there a more fundamental shift underway in how state leaders think about criminal justice issues and how they oversee the system, heralding a new era of policy making based on data and research?"

Kentucky participants included Kentucky Department of Corrections Commissioner LaDonna Thompson, Kentucky Department Juvenile Justice Commissioner Bob Hayter, Administrative Office of the Courts Director Laurie Dudgeon, Cabinet for Health and Family Services Deputy Secretary Dana Nickles, Department of Community Based Services Commissioner Teresa James, Henderson County Attorney Steve Gold, Kentucky Justice and Public Safety Cabinet Secretary J. Michael Brown, Kentucky Chamber of Commerce Director of Public Affairs Ashli Watts, and Public Advocate Ed Monahan.

Bipartisan Coalition for Criminal Justice Reform Debuts
By: Christopher Hooks

Published on Thursday, September 18, 2014, at 10:51 CST, Texas Observer

"To keep the cause of criminal justice reform advancing, advocates are launching the "Texas Smart-on-Crime Coalition." In it, the left-leaning Texas Criminal Justice Coalition and right-leaning Texas Public Policy Foundation stand united. So do the big-money Texas Association of Business, and the central Texas branch of the non-profit Goodwill Industries. The launch event featured both Terri Burke, the head of the Texas ACLU, and Edna Staudt, a Republican justice of the peace from law-and-order Williamson County."


Newt Gingrich


Van Jones


Grover Norquist

Gingrich-Jones-Norquist on Reducing Incarceration

To spur us on and to demonstrate that this is not a conservative or liberal issue but a commonsense issue, Grover Norquist and Newt Gingrich, along with Van Jones, addressed participants about our responsibility to reduce correctional costs. Gingrich supported California 2014's Prop 47 which just passed; it lowers penalties for crimes, reducing felonies to misdemeanors. The measure was promoted by George Gascón, San Francisco District Attorney, and William Lansdowne, former San Diego Police Chief. Gingrich and Jones are working on an initiative to cut the prison population by 50% over the next decade called #Cut50.

Norquist said that conservatives assumed the criminal justice professionals were properly handling things, so conservatives were not paying attention to the fact that correctional costs were rising without the outcomes to support the extensive government expenditures. He went

on to say left-right coalitions on criminal justice reforms are happening and are an opportunity for greater reform. According to Norquist, the huge expense of corrections has gotten conservatives' attention and has opened people to new ideas. He said Texas is a good example that has worked, saving money. Analyzing the challenge, Norquist said that "the conservatives… helped to create part of the problem and…. I just assumed that the wardens and the prosecutors were taking care of this….and we measured inputs instead of outputs." We want to move away from mass incarceration and "reduce crime as rapidly and as seriously as possible while spending less money but the real cost of doing this wrong are broken families, destroyed neighborhoods, and lives that didn't need to be stunted."

Jones discussed a need for reform in the pretrial, sentencing, and reentry areas; adding the red states have made more progress on reducing correctional costs than the blue states. Gingrich noted Chuck Colson was a "genuine moral force" bringing attention to incarceration problems. Gingrich said, "Facts matter….You just had to look at the data and realize that we were putting way too many people in jail. You cannot be a conservative who inherently distrusts government and who inherently favors personal freedom and look at the number of people in jail in the United States and not be deeply troubled….The weight of fact forced a number of us to say we didn't get it quite right and we better go back and rethink it…."

PEW has posted video of its plenary and keynote sessions online at: http://www.pewtrusts.org/en/research-and-analysis/collections/2014/11/justice-reinvestment-national-summit-sustaining-success-maintaining-momentum

Penalties Lowered by Voters: California Proposition 47 passes 59% - 41%

As further evidence of the seriousness of this bi-partisan effort, Gingrich and Jones discussed at the PEW November Summit their recent successful work on California Proposition 47, the Reduced Penalties for Some Crimes Initiative, which was on the November 4, 2014 ballot. The measure was approved 59% - 41%.

According to the Legislative Analyst's Office, the California Legislature's Nonpartisan Fiscal and Policy Advisor. http://www.voterguide.sos.ca.gov/en/propositions/47/analysis.htm, "This measure reduces penalties for certain offenders convicted of nonserious and nonviolent property and drug crimes. The measure also allows certain offenders who have been previously convicted of such crimes to apply for reduced sentences. In addition, the measure requires any state savings that result from the measure be spent to support truancy (unexcused absences) prevention, mental health and substance abuse treatment, and victim services. These changes are described in more detail below.

This measure reduces certain nonserious and nonviolent property and drug offenses from wobblers or felonies to misdemeanors. The measure limits these reduced penalties to offenders who have not committed certain severe crimes listed in the measure—including murder and certain sex and gun crimes. Specifically, the measure reduces the penalties for the following crimes:

- ***Grand Theft.*** Under current law, theft of property worth $950 or less is often charged as petty theft, which is a misdemeanor or an infraction. However, such crimes can sometimes be charged as grand theft, which is generally a wobbler. For example, a wobbler charge can occur if the crime involves the theft of certain property (such as cars) or if the offender has previously committed certain theft-related crimes. This measure would limit when theft of property of $950 or less can be charged as grand theft. Specifically, such crimes would no longer be charged as grand theft solely because of the type of property involved or because the defendant had previously committed certain theft-related crimes.
- ***Shoplifting.*** Under current law, shoplifting property worth $950 or less (a type of petty theft) is often a misdemeanor. However, such crimes can also be charged as burglary, which is a wobbler. Under this measure, shoplifting property worth $950 or less would always be a misdemeanor and could not be charged as burglary.
- ***Receiving Stolen Property.*** Under current law, individuals found with stolen property may be charged with receiving stolen property, which is a wobbler crime. Under this measure, receiving stolen property worth $950 or less would always be a misdemeanor.
- ***Writing Bad Checks.*** Under current law, writing a bad check is generally a misdemeanor. However, if the check is worth more than $450, or if the offender has previously committed a crime related to forgery, it is a wobbler crime. Under this measure, it would be a misdemeanor to write a bad check unless the check is worth more than $950 or the offender had previously committed three forgery related crimes, in which case they would remain wobbler crimes.
- ***Check Forgery.*** Under current law, it is a wobbler crime to forge a check of any amount. Under this measure, forging a check worth $950 or less would always be a misdemeanor, except that it would remain a wobbler crime if the offender commits identity theft in connection with forging a check.
- ***Drug Possession.*** Under current law, possession for personal use of most illegal drugs (such as cocaine or heroin) is a misdemeanor, a wobbler, or a felony—depending on the amount and type of drug. Under this measure, such crimes would always be misdemeanors. The measure would not change the penalty for possession of marijuana, which is currently either an infraction or a misdemeanor.

We estimate that about 40,000 offenders annually are convicted of the above crimes and would be affected by the measure. However, this estimate is based on the limited available data and the actual number could be thousands of offenders higher or lower.

The measure requires that the annual savings to the state from the measure, as estimated by the Governor's administration, be annually transferred from the General Fund into a new state fund, the Safe Neighborhoods and Schools Fund. Under the measure, monies in the fund would be divided as follows:

- 25 percent for grants aimed at reducing truancy and dropouts among K-12 students in public schools.
- 10 percent for victim services grants.
- 65 percent to support mental health and drug abuse treatment services that are designed to help keep individuals out of prison and jail."

Commonsense Opportunities to Reduce Waste in the KY Criminal Justice System in 2015 By Ed Monahan

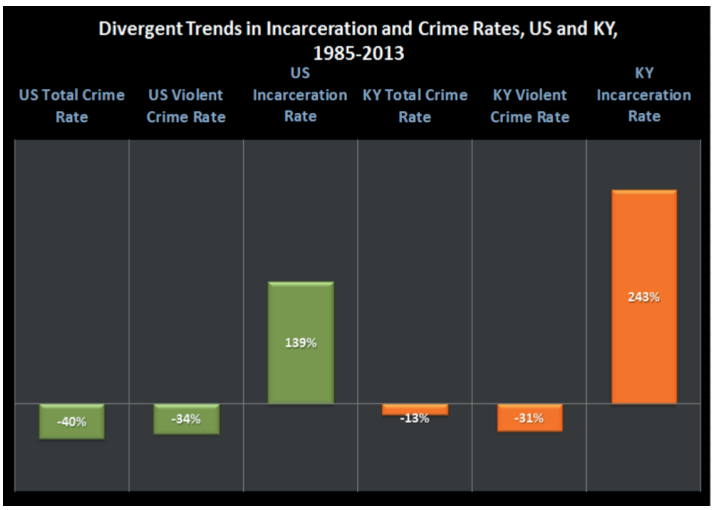
Kentucky has an opportunity to make more progress in 2015. It needs to do so. There are a variety of ideas that will safely accomplish the objective of smartly reducing costs in a way that ensures safety. Most of the

ideas include modestly reducing the discretion of the parole board, judges, and prosecutors to increase the safe release of persons who have been evaluated by evidence-based, validated risk assessments as having a low risk of reoffending.

Additionally, the unnecessary incarceration of some people has unintended negative consequences. For instance, there is substantial Kentucky data indicating that keeping low risk offenders in jail for just a few days is correlated with future criminal activity. The Arnold Foundation's Pretrial Criminal Justice Research study found that, "when held 2-3 days, low-risk defendants were almost 40 percent more likely to commit new crimes before trial than equivalent defendants held no more than 24 hours." http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF-Pretrial-CJ-Research-brief_FNL.pdf

Arnold Foundation, *Pretrial Criminal Justice Research* (November 2013)

County jails remain one of the most significant costs for Kentucky communities. Yet, jails have many low and moderate risk pretrial detainees being unnecessarily housed at the county's expense. State prison costs continue to increase and remain the most significant part of the Kentucky criminal justice system with 36% of total system funding. However, many low risk inmates remain imprisoned even though they could safely be released. Increased funding for rising correctional costs dries up funds for important local needs. In FY14, $490 million was spent on state prisons. Between FY12-14, there was $61 million allocated as a necessary governmental expense for a prison population that exceeded the forecasted level. While our crime rates decline, our correctional costs increase.



Kentucky's correctional costs will increase in 2015 unless there are modest, commonsense reforms to safely reduce the waste. Some reforms that can be accomplished in 2015 include:

1. Require parole of inmates who have been evaluated as low risk by a validated, evidence-based risk assessment.
2. Reduce low level misdemeanors to violations that are not subject to jail sentences and that require a fine that can be prepaid.
3. Increase pretrial release of low and moderate risk pretrial detainees who are presumed innocent by adding a "clear and convincing" standard of review for a decision by a judge who refuses release.
4. Allow Class D felonies to be expunged after 5 years of no other crimes. According to AOC and KSP, 94,645 people are eligible for class D felony expungement. There is a $100 fee for a person having their felony expunged with $50 going to the general fund and $50 to the clerk. If all eligible persons had their felony expunged, $4.7 million would go to the general fund and $4.7 million to a trust and agency account for deputy clerks.
5. Reduce low level felonies to "Gross Misdemeanors" with the cases remaining in Circuit Court and the state retaining responsibility for the cost of incarceration.
6. Make modest adjustments to the persistent felony and violent offender laws to insure only incorrigible persons are imprisoned for lengthy periods by: a) limiting a PFO charge to persons who have been incarcerated on prior offenses, b) allowing jurors to decide in their discretion if someone should be convicted as a persistent felony offender, and c) reducing the 85% parole eligibility for persons convicted of violent offenses to 50% giving the Parole Board discretion. In 2011, Kentucky spent more than $169,000,000 incarcerating almost 8,000 prisoners sentenced under the PFO statute, the Violent Offender statute, or both.
7. Increase the felony theft level from $500 to $1,000 or $2,000. There are 30 states that have felony floors of $1,000 or higher. Only 15 States have felony floors of $500 or lower, as Kentucky does.
8. Allow judges to exclude death as a possible punishment prior to trial upon showing that the evidence does not warrant such prosecution.

The KY Chamber of Commerce Calls for Continued Cost-Reducing Correctional Reforms

The Kentucky Chamber supports fiscally responsible policies that utilize tax dollars wisely as indicated by the Corrections Recommendations in its July 2014 *The Leaky Bucket Report: 5 Years Later*. http://www.kychamber.com/sites/default/files/Leaky%20Bucket%205%20Years%20Later_0.pdf

"Continue full implementation 2011 sentencing-reform legislation to control the growth in corrections costs and carefully consider legislative efforts to increase penalties that will result in higher corrections cost. Continue this positive trend in more appropriate use of expensive

corrections resources with full implementation of 2014 juvenile justice legislation. The General Assembly should also continue reviewing the Kentucky Penal Code with the goal of creating more alternative to incarceration for low-level, non-violent crimes and focus on jail time for more serious offenses. Potential areas for review recently identified by the Kentucky Department of Public Advocacy include:

- Alternative sentencing for flagrant non-support instead of imprisonment for a felony
- Modification of the persistent felony offender statute
- Increasing the dollar amount for the felony theft limit
- Presuming parole for eligible low-risk offenders
- Adoption of a "clear and convincing" standard for pretrial release
- Creation of a "gross misdemeanor" classification for low-level felonies"

Bluegrass Institute Calls for Reducing Incarceration Costs

Jim Waters of the Bluegrass Institute, center, testifies before the October 3, 2014 Joint Judiciary Committee on the need for commonsense criminal justice reform to insure good stewardship of taxpayers' dollars. Lexington's Wesley United Methodist Church Pastor Anthony Everett, left, and Public Advocate Ed Monahan, right, also testified for commonsense reform.

At the Interim Joint Judiciary Committee on October 3, 2014, Jim Waters, President of the Bluegrass Institute for Public Policy Solutions testified as follows:

My name is Jim Waters. I'm the president of the Bluegrass Institute for Public Policy Solutions. We are a free-market think tank focused on offering commonsense, economically sound solutions to Kentucky's greatest challenges.

I would like to thank Kentucky Public Advocate Ed Monahan for his tireless and focused work on this issue. I would also like to thank you for your continuing commitment to riding the wave of momentum created by passage of House Bill 463, and by your willingness to consider relevant data and research that can help identify meaningful solutions for further reforming the Commonwealth's criminal-justice policy while reducing taxpayers' costs.

I'll be honest: when Public Advocate Monahan first approached me under the guise of wanting to see how we could work together to reduce overspending and waste in our criminal-justice system, I wasn't sure. I certainly didn't want to be part of a campaign that, in any way, threatens the safety and security of our fellow Kentuckians. Only as people are safe in their livelihoods and their properties are secure, can we hope to achieve true freedom and prosperity.

While we need to continue to protect life, limb, and property from violent criminal acts, I'm convinced that Advocate Monahan is offering a balanced approached with these commonsense proposals that other states are successfully pursuing, and that other state-based free-market groups like the Texas Public Policy Foundation – our sister free-market organization in the Longhorn State – fully and heartily endorse.

While there certainly is a need for a lock-'em-up-and-throw-away-the-key approach to violent and repeat offenders of serious crimes, we also must not allow emotion, politics, what is politically easy or fear to dictate our public policy. Instead, we need reasoned, measured, and balanced approaches based on sound research and, yes, a good dose of common public-policy and fiscal sense.

It makes common fiscal sense to consider reclassifying minor misdemeanors downward to violations – especially when doing so would, according to the Kentucky Legislative Research Commission, bring substantial savings to jails and reduce court time while increasing revenues from the fines collected.

It also makes good fiscal sense to continue the momentum begun by passage of House Bill 463 by reducing low-level felonies to gross misdemeanors. Why shouldn't we lower the sentence for many non-violent offenders while saving taxpayers the $46 a day it costs to incarcerate an offender?

Also, let's find ways to encourage parole board members to fulfill the spirit of House Bill 463 by paroling more of the nearly 30 percent of low-risk offenders that they refused to parole in 2012. Just the failure to parole more than 600 low-risk offenders costs taxpayers nearly $28,000 per day in unnecessary costs.

What concerns us about this is that the rate of parole for low-risk offenders is going in the wrong direction; it's falling. During fiscal 2014, less than 64 percent of low-risk offenders were being released. While that release rate did improve a bit to 72 percent in August, the point remains relevant: a commonsense, taxpayer-friendly approach to criminal justice policy takes into account that releasing low-risk offenders instead of keeping them locked up in prison would not only save taxpayers that $46 per day per prisoner, but also it can also be done safely as parole boards use the highly effective risk-assessment tools available to them.

The Bluegrass Institute joins with Advocate Monahan in commending Kentucky policymakers for successful implementation of the sound reforms imbedded in House Bill 463, which are estimated to save the Commonwealth more than $400 million during the next decade.

But these solutions do more than just save taxpayers money. A balanced, commonsense approach can empower victims of crime and reform offenders, too. It's also worth noting that the substantial savings gained from these reforms will, in fact, ensure that we have the needed resources as a commonwealth to incarcerate violent offenders and protect our citizens.

In recent years, Kentucky has enacted meaningful reforms in its justice system for both adults and juveniles. In his statement when signing House Bill 463 into law, Governor Beshear noted that "over the last three years,

we've made headway with aggressive efforts to bring common sense to Kentucky's penal code, and our prison population has dropped each of the past three years. House Bill 463 helps us be tough on crime while being smart on crime."

The Bluegrass Institute could not agree more. But we hope that this is just the beginning of reforms, and that policymakers will consider additional cost-saving developments such as we see occurring in other states, including Texas – where the crime rate has reached its lowest level since 1968, even as the incarceration rate has plunged by nearly 12 percent just since 2005.

Kentucky's crime rate also has dropped even as reforms have been introduced, which should allay any fear that implementing these would next steps somehow or other erodes the safety of our state and its citizens.

We encourage policymakers to ride the wave of momentum created by the bipartisan hard work on – and support for – House Bill 463, and implement those additional reforms proposed by Advocate Monahan that represent good stewardship of taxpayers' dollars and sound, common-sense criminal-justice policy. See also: http://www.bipps.org/bluegrass-beacon-fear-criminal-justice-reforms/

Provisions of Proposed KY Felon Expungement Bills are Bipartisan and Straightforward

Legislation relating to employment of ex-felons who have reestablished themselves as law-abiding citizens

Darryl T. Owens

David Floyd

Jimmy Higdon

Many Kentuckians with prior convictions work hard to become productive members of society, but their criminal records unnecessarily hamper their efforts at a decent future. Today in Kentucky, expungement is unavailable to citizens convicted of even the lowest level of felonies.

Research shows that the stigma of a prior conviction can limit the ability of some individuals to take steps towards personal responsibility. A study by the Society for Human Resource Management found that more than 80 percent of employers conduct background checks on job applicants. Landlords conduct background checks and limit the ability of some to participate in the private rental market. The end result is the penalty of collateral consequences of conviction that greatly impact an individual's capacity to engage politically, economically, and socially in society.

A felony sentence is an economic death sentence. Persons convicted of a felony have lifelong problems in finding employment *even if they do not re-offend for years*. They face many other significant collateral consequences.

Expungement of felony convictions, once certain conditions are met, enables former offenders to be more productive citizens, pay taxes, and meet family obligations as it helps them obtain and maintain employment. Limited employment opportunities are formidable obstacles that convicted felons must face. See Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry*, 112, 2003.

Most experts know and ex-offenders experience that finding a job is critical to successful reintegration and reduction of recidivism. Studies show that finding and maintaining a legitimate job after release can reduce the chances of reoffending.[1] Research has also shown that the higher the wages, the less likely persons released from prison will return to crime.[2]

In 2014 there were felony expungement bills filed that were straightforward and had bipartisan support, but did not become law.

For instance, HB 64:

- Allows a person to ask a court to expunge a felony conviction 5 years after completion of the entire sentence;
- Provides it will be longer than 5 years because the sentence has to be fully completed which includes the serving the length of the sentence, payment of all fines and fees, and completion of the entire time on probation or parole;
- Only applies to persons who do not have other felony or misdemeanor convictions;
- Does not apply to a sex offense or an offense committed against a child;
- Provides the prosecutor and any victim the right to present evidence to the judge considering expungement;
- Allows inspection of expunged criminal records where required by federal or state law or regulation.

HB 64 passed the House 79-21.

Additionally, Senator Jimmy Higdon filed SB 107 in 2014. It would allow expungement 10 years after the time of adjudication.

Important for businesses, the length of time correlates directly with empirical evidence

Alfred Blumstein and Kiminori Nakamura did an empirical study on the issue of when the risk of reoffending is no longer relevant to employment decisions. Redemption in an Era of Widespread Criminal Background Checks, NIJ Journal, Issue No. 263. They found that after 3.8 – 7.7 years the risk of recidivism was no greater than the risk of the general population, depending on the age of the offender and the type of crime committed.

Blumstein and Nakamura also observed that "Most people would probably agree that there should be some point in time after which ex-offenders should not be handicapped in finding employment. …It is well known — and widely accepted by criminologists and practitioners alike — that recidivism declines steadily with time clean. Most detected recidivism

[1] Christopher Uggen. 2000. Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism. *American Sociological Review* (65), 529-546. Robert Sampson and John Laub. 1997. A Life-course Theory of Cumulative Disadvantage and the Stability of Delinquency. *Advances in Criminological Theory* (7), 133-161; Miles Harer. 1994. Recidivism of Federal Prisoners Released in 1987. Washington, D.C.: Federal Bureau of Prisons, Office of Research and Evaluation; Robert Sampson and John Laub. 1993. Crime in the Making: Pathways and Turning Points through Life. Cambridge, MA: Harvard University Press.

[2] Jared Bernstein and Ellen Houston. 2000. Crime and Work: What We Can Learn from the Low wage Labor Market. Washington, D.C.: Economic Policy Institute; Jeff Grogger. 1998. Market Wages and Youth Crime. *Journal of Labor Economics* (16), 759-91.

occurs within three years of an arrest and almost certainly within five years."

Expungement possibility is a specific incentive for good behavior

The possibility of expungement is significant incentive for offenders not to reoffend.

Nationwide there is a growing bipartisan awareness of the long-term negative impact of collateral consequences and states are taking steps to combat the ill effects of these sanctions

From 2010 through 2014, at least 18 states[3] expanded or established expungement policies. Recent documentation of expungement measures adopted demonstrates that this approach has garnered increasing acceptance.[4] Recent legislation includes:

- **Louisiana** - Senate Bill 403 authorized expungement for persons convicted of a first nonviolent felony offense for certain drug crimes including low-level drug possession, manufacturing, and selling offenses. This bill allowed individuals with one felony conviction for possession, distribution, or possession with intent to distribute 28 grams or less of cocaine, amphetamines, oxycodone, or methadone to apply to have their records expunged. [5]

- **Mississippi** - House Bill 160 authorized expungement relief for persons with certain first-time felony convictions, including drug possession, shoplifting, and writing bad checks. This provision allows eligible petitioners to apply for expungement relief for a felony conviction five years after completing the terms and condition of their sentence. [6]

- **Tennessee** - House Bill 2865 authorized expungement relief for individuals convicted of certain first-time, non-violent and non-sexual misdemeanors, and Class E felonies after a five-year waiting period. At the time of application for expungement, the individual must have met all conditions of supervised or unsupervised release, including the payment of all fines and restitution.[7]

- **Utah** – House Bill 33 expanded Utah's expungement provisions relating to certain drug possession and paraphernalia offenses. The bill amended the process to expunge drug offenses by adding another felony and misdemeanor to the list that can be expunged. The measure requires the petitioner to be free of illegal substance abuse and to successfully manage their substance addiction.[8]

- **Indiana** - House Bill 1033, sponsored by Rep. Jud McMillin (R) expands the list of offenses that petitioners may request a court to seal or expunge from arrest or conviction records. The bill authorizes the sealing on non-conviction arrests after one year and expungement of misdemeanor records after five years for various offenses including Class D felonies that have been reduced to misdemeanors.

  "Since the Second Chance Law went into effect, I have listened to countless testimonies from Hoosiers, many trying to provide for their families or wishing to attend college, that have been discouraged from bettering their lives because of a low-level criminal offense they committed years ago," said Rep. McMillin.

  State Representative P. Eric Turner (R-Cicero), co-sponsor for the 2014 clean-up bill stated, "After many years of work, I was pleased to lead the charge on getting expungement language put into statute last year. I understand it can be difficult for those with prior convictions to rebuild their lives in our society, and while we should certainly hold them accountable for their actions, those who have made mistakes should not be handcuffed by our justice system forever. Our judicial system isn't supposed to be strictly punitive. It should be focused on reformation and rehabilitation as a means to reduce recidivism. People make mistakes and once they have paid their debt to society, all they want to do is get on with their lives and provide for their family," said Rep. Turner. "This law is a positive step forward to improving the lives of Hoosiers."

Representative Jud McMillin, R-Brookville

Greater Indianapolis Chamber of Commerce supported Indiana felony expungement bill

The 2013 Indiana felony expungement bill "earned the support of the Greater Indianapolis Chamber of Commerce. Angela Smith Jones, the chamber's director of public policy, said the cost of high unemployment among ex-offenders takes a toll on communities.

"It deteriorates the community — structurally, economically, emotionally, and socially," she said. "For all of those reasons, it's important for those who've remedied themselves and are on the right path, to give them opportunity to get back into the workforce, get trained, and contribute to the community."[9]

Senators Paul and Booker introduce felony expungement bill

On July 8, 2014 Senators Paul (R-Ky.) and Booker (D-N.J.) introduced S. 2567 The REDEEM (Record Expungement Designed to Enhance Employment) Act[10] to

Senator Rand Paul R - Kentucky

Senator Cory Booker D - New Jersey

[3] States include: Arkansas, California, Colorado, Delaware, Georgia, Louisiana, Indiana, Maryland, Mississippi, North Carolina, Ohio, Oregon, Rhode Island, South Dakota, Tennessee, Texas, and Utah.

[4] Staff, "State Reforms Reducing Collateral Consequences for People with Criminal Records: 2011-2012 Legislative Round-Up," The Sentencing Project, National Employment Law Project, Legal Action Center and Crossroad Bible Institute. September 2012.
Available at:
http://www.sentencingproject.org/doc/State%20Collateral%20Consequences%20Legislative%20Roundup%20Sept%202012%20(1).pdf

[5] *An Act Relative to Expungement of Criminal Records. 2012 Louisiana Acts No. 776. June 12, 2012.*
Available at:
http://www.legis.la.gov/legis/ViewDocument.aspx?d=812321&n=SB403%20Act%20776

[6] An Act to Provide a Procedure to Expunge Certain Felony Convictions. 2010 Mississippi Acts No. 460. April 1, 2010.
Available at: http://billstatus.ls.state.ms.us/documents/2010/pdf/HB/0100-0199/HB0160SG.pdf

[7] *Tennessee Gen. Laws ch. 1103. May 29, 2012.*
Available at:http://wapp.capitol.tn.gov/apps/Billinfo/default.aspx?BillNumber=HB2865&ga=107

[8] *Utah Expungement Act (2010). Title 77. Chapter 40. Available at: http://www.le.utah.gov/code/TITLE77/77_40.pdf*

[9] Reported in *the Indiana Economic Digest*, daily news on business and economic events throughout Indiana, in its January 31, 2013 issue, Maureen Hayden, Herald Bulletin CNHI Statehouse Bureau chief, "Criminal records expungement bill moves forward in Indiana House."

[10] https://beta.congress.gov/113/bills/s2567/BILLS-113s2567is.pdf

provide for the sealing or expungement of records relating to Federal nonviolent criminal offenses.

"The biggest impediment to civil rights and employment in our country is a criminal record. Our current system is broken and has trapped tens of thousands of young men and women in a cycle of poverty and incarceration. Many of these young people could escape this trap if criminal justice were reformed, if records were expunged after time served, and if nonviolent crimes did not become a permanent blot preventing employment," said Paul.

Booker said, "The REDEEM Act will ensure that our tax dollars are being used in smarter, more productive ways. It will also establish much-needed sensible reforms that keep kids out of the adult correctional system, protect their privacy so a youthful mistake can remain a youthful mistake, and help make it less likely that low-level adult offenders re-offend."

The REDEEM (Record Expungement Designed to Enhance Employment) Act includes these provisions:

1. Expungement would be available for offenses that are not violent or sex offenses.
2. To be eligible, a person cannot have more than 2 non-violent felonies and this includes previously sealed convictions. This would keep the expungement provisions from being used by career criminals, but still allow a person who has reformed after one or two bad decisions to achieve legal restoration. Importantly, the bill provides a definition that allows for multiple charges to be considered a single conviction in narrow circumstances. One of these circumstances is when multiple offenses (up to 3) are directly related to ongoing addiction or substance abuse.
3. There is a one year waiting period for convictions (after completion of sentence or supervision) and no waiting period for non-convictions.
4. This bill allows for the release of information relating to a sealed record when required for an employment security clearance.
5. The bill includes streamlined and in some cases, automatic expungement of juvenile offenses.

Amend Minor Misdemeanors to Violations and Increase Revenue

Practitioners realize that many offenses classified as misdemeanors rarely result in jail time but still require valuable system resources to resolve. Amending these offenses to violations would maintain a criminal sanction but reduce greatly the drain on the court system.

In 2013 Representative Riner introduced HB 395. It amended to prepayable violations a number of minor misdemeanors that currently do not often result in jail. This carries a number of benefits:

1. Prepayment of a fine is a guilty plea under KRS 431.452 and results in a conviction so offenders are held accountable for their behavior.
2. Under circumstances where public safety is implicated, a peace officer is still authorized to make an arrest under KRS 431.452.
3. Court and prosecutor resources would be saved as many defendants charged with these offenses will elect to prepay the fines and avoid court.
4. Caseloads for public defenders would be reduced as offenders charged only with violations would not have a right to appointment of counsel.
5. Many offenders currently come to court and simply want to plead guilty so they can return to work or other responsibilities instead of waiting for their court hearing. This will allow them to avoid court altogether if they are willing to admit guilt and pay the fine.
6. Many defendants charged with these minor offenses have charges dismissed when they come to court. Allowing prepayment of fines could result in an increase of fines and court costs as more convictions result and payments are made in advance rather than on a delayed payment schedule.

Crimes included in the 2013 bill were:

- Possession of drug paraphernalia
- Owning or operating a vehicle without insurance, first offense
- Unlawful access to a computer in the third degree
- Unlawful access to a computer in the fourth degree
- Criminal trespass in the second degree
- Criminal trespass in the third degree
- Criminal possession of a noxious substance
- Criminal littering
- Unlawfully using slugs in the second degree
- False advertising
- Bait advertising
- Compounding a crime
- Unlawful assembly
- Harassing communications
- Public intoxication
- Disrupting meetings in the second degree
- Possession of marijuana

The LRC Fiscal Note to 2013's HB 395 stated: "Information provided by the Administrative Office of the Courts indicates that there were 2,654 convictions in Circuit Court and 35,066 convictions in District Court for the above listed misdemeanors during fiscal year 2012. It should be noted that 21,100 were traffic related, and were likely to not include an arrest, but would require a court appearance. Changing these offenses to violations that can be prepaid would appear to have the following impact:

Currently, persons arrested for a number of these misdemeanors are generally taken to the county jail and must undergo the pre-trial release process. For virtually all of these cases, a court appearance for arraignment and possibly trial is required. Changing these offenses to misdemeanors would reduce the caseload of the courts.

Persons cited for a violation are generally not arrested and are not taken to the county jail. Also, they are not generally sentenced to jail time for the offense. This could provide a savings to local jails.

Persons found guilty of a violation, or admitting guilt will be required to pay monetary fines and court costs. This could result in an increase to the General Fund in revenue from fines, especially since offenders can prepay the fine and avoid appearing in court."

Create New Classification for "Gross Misdemeanors"

Kentucky should create a new "Gross Misdemeanor" classification that would fall in between felonies and misdemeanors, as exists in other states including Minnesota and Washington. This would eliminate the designation of convicted felon for many non-violent offenders who deserve significant punishment but not necessarily the lifetime consequences of a felony conviction. The new statute should provide that persons serving sentences for Gross Misdemeanors would be state prisoners avoiding any transfer of costs to counties.

Characteristics of Gross Misdemeanors would include:

- Penalty Range - 6 months to 2 years
- Prosecuted in Circuit Court
- Those convicted would be state prisoners, but authorized to be housed in county jails
- Conviction would not lead to collateral penalties relating to felonies
- Automatic or highly presumptive probation
- 2-year probationary period
- Expungeable

Examples of offenses to be Gross Misdemeanors are

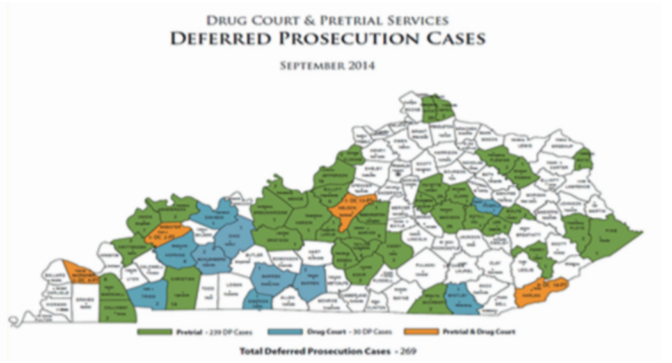
- Possession of Controlled Substance in the First Degree
- Criminal Possession of a Forged Instrument 2nd Degree
- Promoting Contraband
- Flagrant Nonsupport
- Tampering with Evidence

Legislative changes needed to create this category include:

- Repeal KRS 431.060 (crimes punishable by penitentiary are felonies; limited by *Lundergan*, 847 S.W.2d 729 (Ky. 1993)
- Define Gross Misdemeanor in KRS 500.080 and redefine felony to refer to an offense for which a *minimum* sentence of one year in prison is authorized
- Create new statute in KRS Chapter 532 for sentence of imprisonment for Gross Misdemeanor to establish that the sentence shall be an indeterminate sentence within the range of 6 months to 2 years.
- Amend KRS 24A.110 to limit District Court jurisdiction over Gross Misdemeanors to the same extent as felonies.

The benefits or reducing low level felonies to a gross misdemeanor include:

- Reducing the prison population by lowering the sentence for many non-violent offenses;
- Helping reentry and reformation efforts by eliminating the convicted felon label;
- Holding offenders accountable with sentences of at least six months and up to two years; and
- Maintaining jurisdiction in Circuit Court and with the Department of Corrections to avoid increase in county expenditures.



AOC Deferred Prosecution Data

Since Inception:

Pretrial Services
- 517 defendants entered
- 69 successful completions; 208 terminations
- Active caseload of 240 on 09/02/2014

Drug Court
- 62 defendants entered
- 13 successful completions; 19 terminations
- Active caseload of 30 on 09/08/2014

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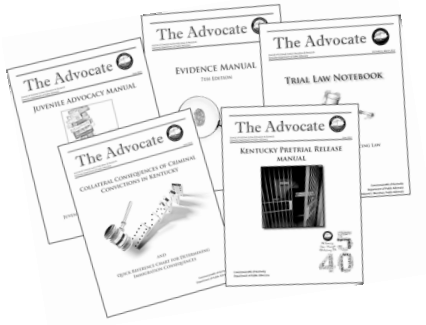

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Department of Public Advocacy

200 Fair Oaks Lane, Suite 500 • Frankfort, Kentucky 40601 • 502-564-8006, Fax: 502-564-7890

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